

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
OFFICE OF SPECIAL MASTERS**

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JENNIFER ROSS

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Petitioner,

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v.

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SECRETARY OF THE DEPARTMENT  
OF HEALTH AND HUMAN SERVICES,

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Respondent.

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No. 06-412V

Special Master Christian J. Moran

Filed: October 4, 2007

hepatitis B, demyelinating disease,  
lack of expert testimony,  
denial of entitlement

Scott Rooney, Esq., Morgan and Myers, PLC, Dearborn, Michigan, for Petitioner;  
Nathaniel McGovern, Esq., United States Department of Justice, Washington, DC, for  
Respondent.

**UNPUBLISHED DECISION DENYING ENTITLEMENT\***

Pursuant to the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 et seq.  
(2006), Jennifer Ross brings two claims. She claims that the hepatitis B vaccination caused her  
to develop a neurologic disease. Alternatively, she contends that the hepatitis B vaccination  
significantly aggravated an underlying neurologic disease. Although the precise disease is not

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\* Because this unpublished decision contains a reasoned explanation for the special  
master's action in this case, the special master intends to post it on the United States Court of  
Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-  
347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

Vaccine Rule 18(b) states that all decisions of the special masters will be made available  
to the public unless they contain trade secrets or commercial or financial information that is  
privileged and confidential, or medical or similar information whose disclosure would clearly be  
an unwarranted invasion of privacy. When such a decision or designated substantive order is  
filed, petitioner has 14 days to identify and to move to delete such information before the  
document's disclosure. If the special master, upon review, agrees that the identified material fits  
within the banned categories listed above, the special master shall delete such material from  
public access.

perfectly clear, Ms. Ross has been diagnosed with transverse myelitis and multiple sclerosis.

Ms. Ross filed a motion seeking a judgment based upon the record. This motion is GRANTED. A preponderance of the evidence establishes that she is not entitled to compensation. Thus, the Clerk's Office is ORDERED to enter a decision in favor of respondent.

## **I. Factual History**

The parties do not contest the accuracy of the contemporaneously created medical records. See Resp't Rep't, filed August 16, 2006, at 2. The following summary sets forth the information relevant to deciding this case.

Ms. Ross was born on May 19, 1973. Exhibit 3 at 1. Her relevant medical history begins in 1997. At that time, her primary physician was Dr. Reginald O'Neal.

The first signs of possible neurologic problems appear in the records from 1997, when Ms. Ross suffered from headaches that Dr. O'Neal evaluated as possibly being migraine headaches. In January 1998, Dr. O'Neal prescribed a different medication because her headaches had increased. Exhibit 2 at 28-29. A subsequent visit on January 3, 2001, was prompted, in part, because of migraine headaches. Id. at 40. The records indicate that she visited the doctor at various times between the January 1998 visit and the January 2001 visit, but none of the notes from these visits mention headaches or migraines. Id. at 29-40.

Another sign of a possible neurologic problem developed in September 2001, when Ms. Ross saw Dr. O'Neal for numbness in two toes. Dr. O'Neal diagnosed a nerve impingement in the foot with tarsal tunnel syndrome. Exhibit 2 at 41.

On May 13, 2003, Ms. Ross had a sore throat, cough, and congestion. Dr. O'Neal diagnosed her as having a viral upper respiratory infection. The upper respiratory infection

apparently developed when she was visiting Cancun, Mexico. Exhibit 2 at 45; see also exhibit 3 at 64 (report dated July 21, 2003).

On May 23, 2000, Ms. Ross received the measles, mumps and rubella (“MMR”) and hepatitis B vaccinations. Exhibit 1 at 2. These vaccinations are the basis for her claim of compensation. Petition ¶ 25.

On approximately June 10, 2003, Ms. Ross developed severe lower back pain, while she was lifting her son. The next day, she noticed that she had difficulty urinating. Exhibit 3 at 341.

On the morning of June 13, 2003, Ms. Ross presented to the emergency room at St. John Macomb Hospital Center. After some testing, she was discharged. Exhibit 3 at 422-23.

Ms. Ross returned to that hospital the same evening. This time, she was admitted and remained in the hospital for approximately two weeks. Exhibit 3 at 62-65 (discharge notes).

While in the hospital, Ms. Ross reported urinary retention, numbness, hyperesthesia, weakness, spasms of her lower extremities, and difficulty walking. Exhibit 3 at 128-30, 229. Ms. Ross had an MRI of her cervical and thoracic spine. The result of these tests suggested a demyelinating process. Id. at 367-68. On June 20, 2003, Ms. Ross’s diagnosis was “transverse myelitis, MS [(an abbreviation for multiple sclerosis)], neuropathy.” Id. at 229. Transverse myelitis is “an inflammation of the spinal cord in which the lesions span the width of the spinal cord at a particular level.” Dorland’s Illustrated Medical Dictionary (30<sup>th</sup> ed. 2003) at 1209. Multiple sclerosis is “a disease in which there are foci of demyelination of various sizes throughout the white matter of the central nervous system.” Id. at 1669. A neuropathy is “a functional disturbance or pathological change in the peripheral nervous systems.” Id. at 1257.

Approximately two weeks after being discharged from the hospital, Ms. Ross had another MRI of the thoracic spine. The findings from this test were consistent with a demyelinating disease. Exhibit 3 at 32 (MRI, dated July 9, 2003). After this test, Ms. Ross was treated by Dr. Chakrapani Ranganathan, a board-certified neurologist.

In her first visit with Dr. Ranganathan, Ms. Ross reported that she was able to void without any difficulty. However, she was experiencing hyperesthesia and paresthesia. Dr. Ranganathan diagnosed Ms. Ross as having transverse myelitis, possibly due to acute demyelinating encephalomyelitis or multiple sclerosis. Exhibit 2 at 64 (report, dated July 21, 2003).

Following this visit with Dr. Ranganathan, Ms. Ross's neurologic health fluctuated. In general, the reports documenting these changes provide little, if any, information relevant to the pending question, which is whether Ms. Ross has established, by a preponderance of the evidence, that the hepatitis B vaccine caused her injury. During her course of treatment, different doctors suggested that Ms. Ross suffered from different diseases. See, e.g., exhibit 2 at 66 (Dr. Ranganathan's October 21, 2003 report stating Ms. Ross "is recovering from [an] episode of transverse myelitis."); exhibit 10 at 14 (Dr. Nilofar Nisar's February 16, 2005 report indicating that Ms. Ross has "multiple sclerosis, relapsing-remitting type."); exhibit 13 at 2 (Dr. Ashraf Mohamed's December 14, 2005 report stating "I am not sure if the patient has multiple sclerosis. There is possible radiculopathy question, lumbar facet disease, and also cervical radiculopathy as well as sacroiliac joint disease."); exhibit F at 2 (Dr. Nisar's January 11, 2006 report stating that Ms. Ross has "sciatica/lumbar radiculopathy causing right lower extremity symptoms."). For

reasons explained in more detail below, the precise nature of her disease is not relevant to the pending question.

## **II. Procedural History**

Ms. Ross filed her petition seeking compensation on May 19, 2006. She filed four exhibits with her petition. She provided additional records and a supplemental affidavit in July and August 2006.

Respondent filed its report, pursuant to Vaccine Rule 4, on August 16, 2006. Respondent concluded that Ms. Ross was not entitled to compensation because, among other reasons, Ms. Ross's treating physicians did not identify a "logical sequence of cause and effect" by which the vaccinations purportedly caused [Ms. Ross's] condition." Resp't Rep't at 12, quoting Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Respondent also noted that before her vaccinations, Ms. Ross experienced symptoms of multiple sclerosis. Finally, respondent submitted five medical articles with its report. Exhibits A-E.

Ms. Ross was instructed to present an expert report. Order, dated September 13, 2006. However, Ms. Ross did not present an expert report. Rather, approximately one year later, she filed a motion requesting a judgment on the record. Respondent's response essentially repeated the position it took in its report. The case is ready for adjudication.

## **III. Analysis**

### **A. Whether A Judgment On The Record Is Appropriate**

Ms. Ross has requested a ruling based upon the record in this case. The records are sufficiently developed that a decision may be made as to whether Ms. Ross is entitled to a

Program award. See 42 U.S.C. § 300aa-12(d)(3)(B)(v); Vaccine Rule 8(b). Thus, Ms. Ross's motion for judgment on the record is GRANTED.

B. Whether Petitioner Is Entitled To Compensation

Ms. Ross argues that the evidence proves "that the Hepatitis B vaccine caused or significantly aggravated . . . [her] pre-vaccination symptoms and multiple sclerosis." Pet'r Mot., filed August 29, 2007, at 7. This statement defines the scope of Ms. Ross's claims. Although Ms. Ross received the MMR vaccine and the tetanus-diphtheria vaccine, she is not pursuing a claim based upon either of these vaccinations. Vaccine Rule 8(f). Thus, the two issues are causation and substantial aggravation by the hepatitis B vaccination.

1. Whether The Hepatitis B Vaccine Caused Ms. Ross's Condition

Ms. Ross is pursuing an off-table claim. See Capizzano v. Sec'y of Health & Human Servs., 440 F.3d 1317, 1319-20 (Fed. Cir. 2006) (describing on-table and off-table claims). The only injury associated with the hepatitis B vaccine on the vaccine injury table is anaphylaxis, 42 C.F.R. § 100.3 (category VIII), and Ms. Ross does not claim this injury.

The Federal Circuit stated the elements a petitioner must establish to be entitled to compensation. The petitioner's

burden is to show by preponderant evidence that the vaccination brought about [the] injury by providing: (1) a medical theory causally connecting the vaccination and the injury; (2) a logical sequence of cause and effect showing that the vaccination was the reason for the injury; and (3) a showing of a proximate temporal relationship between vaccination and injury.

Althen v. Sec'y of Health and Human Servs., 418 F.3d 1274, 1278 (Fed. Cir. 2005). Proof of medical certainty is not required; a preponderance of the evidence suffices. Bunting v. Sec'y of

Health and Human Servs., 931 F.2d 867, 873 (Fed. Cir. 1991). Ms. Ross acknowledges the Althen factors. Indeed, she quotes the same passage from Althen. Pet'r Mot. at 6. However, her contentions about how the evidence establishes these elements are unclear.

For the first factor, Ms. Ross makes two references in her brief. She states: “[a] persuasive medical theory is demonstrated by proof of a logical sequence of cause and effect.” Pet'r Br. at 6. Ms. Ross also contends that she “has shown a medical theory causally connecting vaccine an[d] injury, which theory has been previously [accepted] by the Court.” Id.

Despite her contentions, Ms. Ross cites no evidence of a medical theory connecting the vaccination and her injury. See Pet'r. Br. Rather, in support of her claim, Ms. Ross cites to two cases in which a special master found, based upon the evidence presented in those cases, that petitioners proved that the hepatitis B vaccine caused a demyelinating disease. Werderitsch v. Sec'y of Health & Human Servs., Fed. Cl. No. 99-310V, 2006 WL 1672884 (Fed. Cl. Spec. Mstr., May 26, 2006) and Gilbert v. Sec'y of Health & Human Servs., Fed. Cl. No. 04-455V, 2006 WL 1006612 (Fed. Cl. Spec. Mstr., Mar. 30, 2006).

Citing these cases does not advance Ms. Ross's case. Whether a medical theory links an injury to a vaccination is a factual question, dependent upon the evidence introduced in those cases. For the court to reach the same conclusion in Ms. Ross's case, she must have introduced the evidence from Werderitsch and Gilbert that supported the theory of causation.<sup>1</sup> Allen v.

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<sup>1</sup> If Ms. Ross wanted to introduce evidence from another case into her case, she would have been required to comply with 42 U.S.C. § 300aa-12(d)(4)(A), which permits disclosure of information submitted to a special master only with “the express written consent of the person who submitted the information.”

Sec'y of Health & Human Servs., Fed. Cl. No. 99-504V, 2006 WL 2990221 \*6 (Fed. Cl. Spec. Mstr., Oct. 4, 2006). However, she did not introduce this evidence.

Furthermore, even if this evidence had been introduced into this case, the result might have been different because special masters enjoy discretion in how they evaluate evidence and are not bound by the findings of other special masters. Guillory v. Sec'y of Health & Human Servs., 59 Fed. Cl. 121, 124 (2003).

Even if the findings alone from Werderitsch and Gilbert could be separated from their underlying evidence and imported into this case, Ms. Ross's case would still lack an essential element of proof. Ms. Ross has cited no evidence that demonstrates the second factor required by Althen – a logical sequence of cause and effect showing that the vaccination was the reason for the injury.

Ms. Ross's motion cites the October 21, 2003 report of Dr. Ranganathan as one place in which a doctor stated that the hepatitis B vaccination caused her condition. See Pet'r Br. at 4. Ms. Ross significantly overstates this report. Dr. Ranganathan does not express an opinion that the hepatitis B vaccine caused Ms. Ross's problems. Dr. Ranganathan stated:

The patient is recovering from [an] episode of transverse myelitis. She developed the transverse myelitis reportedly two weeks after getting immunized with hepatitis B and MMR. She is convinced that one of these triggered a reaction and she therefore does not believe she has MS. I explained to her that in her age, with this type of symptom presentation, still MS is a possibility.

Exhibit 2 at 66. Dr. Ranganathan recounts what Ms. Ross believed, and did not express his own opinion. Because there is no evidence that Ms. Ross has any medical or scientific expertise



about how vaccinations interact with the human body, Ms. Ross's beliefs are not persuasive. 42 U.S.C. § 300aa-13(a).

Furthermore, the fact that Ms. Ross raised the possibility that the vaccinations caused her problem permits an inference that Dr. Ranganathan considered the possibility but rejected it. Thus, on a whole, Dr. Ranganathan's October 21, 2003 report fails to support a finding that the hepatitis B vaccination "was the reason for the injury."

Ms. Ross has not identified any other statements from treating doctors that support her claim. A review of the record reveals none. Therefore, Ms. Ross has failed to meet her burden of proving that the hepatitis B vaccination caused her injury.

2. Whether The Hepatitis B Vaccine  
Significantly Aggravated Ms. Ross's Condition

Ms. Ross's second theory for recovery is that the hepatitis B vaccine exacerbated her pre-existing multiple sclerosis. Again, Ms. Ross's brief on this point does not clearly state a theory that would entitle her to compensation. Pet'r. Br. at 6.

A foundation for this theory is that Ms. Ross was suffering from a demyelinating disorder, such as multiple sclerosis, before she received the first dose of the hepatitis B vaccination on May 23, 2000. No expert or treating physician ever stated that Ms. Ross had such a condition. Although some evidence shows that Ms. Ross had headaches before May 23, 2000, someone other than Ms. Ross (or Ms. Ross acting through her counsel) must diagnose Ms. Ross's condition. 42 U.S.C. § 300aa-13(a); Knudsen v. Sec'y of Health & Human Servs., 35 F.3d 543, 549 (Fed. Cir. 1994) (stating special masters do not diagnose illnesses); see also Gilda

Industries, Inc. v. United States, 446 F.3d 1271, 1281 (Fed. Cir. 2006) (attorney statements are not evidence).

Accepting for a moment that Ms. Ross, in fact, was suffering from an undiagnosed demyelinating disease on May 22, 2000, Ms. Ross would still have a gap in the evidence. A petitioner, who asserts a vaccine significantly aggravates a condition, is required to show that the vaccination caused the subsequent worsening of her condition. Keith v. Sec'y of Health & Human Servs., 55 Fed. Cl. 791, 798 (2003). Ms. Ross has cited no evidence in her brief to support this and a review of the record reveals none. Consequently, she cannot prevail on her alternative theory that the hepatitis B vaccine significantly aggravated an undiagnosed demyelinating disease.

#### IV. Conclusion

Ms. Ross has not established, by a preponderance of the evidence, that the hepatitis B vaccine caused her condition. She also has not established that the hepatitis B vaccine significantly aggravated any pre-existing problem. Thus, she is not entitled to compensation. If a motion for review is not filed, the Clerk's Office shall enter judgment in favor of respondent. IT IS SO ORDERED.

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Christian J. Moran  
Special Master